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fecting the mortgagor as owner of the *res* cannot be impugned at all,[18] and that a stipulation which does affect the *res* will at least be enforced for the period of the security.[19] Such stipulations appear invulnerable to attack as being clogs upon redemption. It was long the habit of the courts to condemn every collateral promise which inured to the benefit of the mortgagee as necessarily a clog[20] or as unconscionable *per se*.[21] Where usury laws are in force such stipulations are regarded as devices to cloak disobedience of the statute;[22] but the refreshing modern tendency,[23] at least where usury has been abolished,[24] is to uphold any provision which does not clog the equity of redemption as delimited above,[25] nor in fact involve that unconscionable conduct against whose machinations equity should always and everywhere relieve.[26] Such a conclusion is eminently satisfactory. If the law is fluid enough to adapt itself to changing social conditions, it should find a difference between a seventeenth century "impecunious land owner in the toils of a money lender"[27] and a modern business man seeking with eyes wide open to secure a loan on those conditions which he deems most advantageous to himself.

KNOWLEDGE AS AN ELEMENT OF ASSUMPTION OF RISK.—One of the fundamental principles of the law of torts is that one who knowingly assents to an injury cannot complain of the damage resulting to himself. This rule has most frequently found expression in the maxim *volenti non fit injuria* and the phrase "assumption of risk." The latter is commonly used in cases involving the relation of master and servant and, by the weight of authority, is conceived of as an implied term of the contract of employment,[1] the servant agreeing to assume the risk

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[18]Clawson *v.* Munson (1870) 55 Ill. 394; and see Bradley *v.* Carritt *supra.*

[19]Biggs *v.* Hoddinott, L. R. [1898] 2 Ch. 307.

[20]See Jennings *v.* Ward *supra;* Broad *v.* Selfe (1863) 9 Jur. N. S. 885.

[21]*In re* Edwards' Estate (1860) 11 Ir. Ch. R. 367; Barrett *v.* Hartley (1866) L. R. 2 Eq. Cas. 789; Broad *v.* Selfe *supra.*

[22]Uhlfelder & Co. *v.* Carter's Adm'r. (1879) 64 Ala. 527; see Tholen *v.* Duffy (1871) 7 Kan. 405.

[23]Browne *v.* Ryan *supra,* 678 *et seq;* Buchanan *v.* Harvey [1904] 3 N. B. Eq. 61; and see Potter *v.* Edwards (1857) 26 L. J. Ch. 468.

[24]13 Harv. L. Rev. 595; 1 Coote, Mortgages (7th ed.) 13.

[25]Mainland *v.* Upjohn (1888) L. R. 41 Ch. Div. 126; Potter *v.* Edwards *supra;* Biggs *v.* Hoddinott *supra.*

[26]James *v.* Kerr (1889) L. R. 40 Ch. Div. 449; see Biggs *v.* Hoddinott *supra.*

[27]Samuel *v.* Jarrah Corp. *supra,* 327.

[1]Narramore *v.* Ry. Co. (1899) 96 Fed. 298; I. C. Ry. Co. *v.* Fitzpatrick (1907) 227 Ill. 478; Brown *v.* Rome Co. (1908) 5 Ga. App. 142; Yarmouth *v.* France (1887) L. R. 19 Q. B. D. 647; *contra,* Rase *v.* Ry. Co. (1909) 107 Minn. 260. The conflict of authority arises where assumption of risk is pleaded as a defense to an action founded upon the violation of a statutory duty. The view that assumption is purely contractual in its nature necessitates the rejection of this plea, since otherwise the servant would be allowed to contract his master out of the statute. Narramore *v.* Ry. Co. *supra;* Davis Coal Co. *v.* Polland (1902) 158 Ind. 607. But where the doctrine is based on the maxim *volenti non fit injuria,* its availability

of the dangers ordinarily incident to the service he contemplates entering, his wages to be computed with reference to such assumption.[2] A distinction must, however, be drawn between those obvious risks existing at the time the contract was entered into, which the servant must be deemed to have contemplated by his expressed willingness to undertake work in which they are necessarily involved, and those dangers which result from the employer's negligence, of which the employee is ignorant until after his term of service has begun.[3] It is apparent that such extraordinary risks cannot be considered a term of the original contract, as they may not have come into existence until afterward, and it is everywhere held that they are not assumed until the servant becomes aware of them.[4] His failure to recover for an injury sustained thereafter must therefore be based either on the maxim *volenti non fit injuria,*[5] or upon a new contractual assumption of the risk in question,[6] or upon an implied waiver of his inchoate right of action for injury resulting from the master's negligent performance of his duties, which is evidenced by the servant's continuing in the employment without protest and with full knowledge.[7] Upon whichever theory his recovery be denied, it is clear that the servant's knowledge is a determining factor in absolving the employer from liability. While the maxim is not *scienti,* but *volenti non fit injuria,* the former is an essential ingredient of the latter, inasmuch as consent cannot be implied when the act assented to is not fully comprehended.[8] Moreover it is elementary that every implied contract is based on the contractor's intelligent choice. Finally, waiver is the voluntary relinquishment of a known right, and is predicated largely upon the party's full knowledge of the facts which give rise to the right waived.[9]

The difficulty in determining the extent of *scienter* necessary to assumption of risk, is evidenced by the recent case of *Duggan* v. *Heaphy* (Vt. 1912) 83 Atl. 726, in which the plaintiff was injured by her employer's failure to provide a guard rail for the mangle with which she was working. The employee was aware of the existence of some danger, but did not realize that the cause of such risk was due to the absence of the guard rail, knowing nothing of such a safeguard. Inasmuch as mere appreciation that a situation is dangerous will not bar recovery in the absence of knowledge that the dangerous

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as a defense remains unaffected by the statute. Osterholm *v.* Boston, etc. Co. (1910) 40 Mont. 508; Denver etc. R. R. Co. *v.* Norgate (1905) 141 Fed. 247.

[2]Burns *v.* Telegraph Co. (1904) 70 N. J. L. 745.

[3]Worden *v.* Gore Meenan Co. (1910) 83 Conn. 642; see Rigsby *v.* Oil Well Co. (1905) 115 Mo. App. 297.

[4]1 Labatt. Master & Servant § 271.

[5]Rase *v.* Ry. Co. *supra;* Osterholm *v.* Boston, etc. Co. *supra.*

[6]1 Labatt, Master & Servant § 276; Fifield *v.* Northern R. R. Co (1860) 42 N. H. 225.

[7]Perigo *v.* C. R. I. & P. R. R. Co. (1879) 52 Ia. 276; Bodie *v.* Ry. Co. (1901) 61 S. C. 468; Drake *v.* Auburn City Ry. Co. (1903) 173 N. Y. 466.

[8]Thomas *v.* Quartermaine (1887) L. R. 18 Q. B. D. 685; Fitzgerald *v.* Conn. Co. (1891) 155 Mass. 155.

[9]Mumford *v.* C. R. I. & P. R. R. Co. (1905) 128 Ia. 685.

situation results from the defect or negligent act causing the injury,[10] it was properly held that, being unaware of the existence of the particular defect, she did not assume the risk of the injury resulting. Conversely the risk is not assumed if the plaintiff does not fully appreciate the danger arising from a known defect.[11] Appreciation of the danger and knowledge of the defect are thus both essential elements in the servant's assumption of the risk. Either may be imputed as a matter of law; the former, if knowing the defect, a reasonably intelligent man could not fail to perceive the relation of cause and effect between it and the danger;[12] the latter, if the defect be obvious, or bound to be observed by the servant in the course of his employment.[13] The fact that it is discoverable will not aid the employer, as the employee is entitled to presume that the master's duty of inspection has been performed, and he is therefore under no duty to search for imperfections.[14] In the event that knowledge and appreciation cannot be imputed to the plaintiff as a matter of law, their existence must be found as a fact by the jury in order to defeat the right of action.[15]

THE INSURER'S CONTRACT WITH THE MORTGAGEE UNDER THE MORTGAGEE CLAUSE.—While to-day the contract of insurance[1] is universally considered a contract of indemnity,[2] the principle of indemnity is often misunderstood[3] and the earlier conception of the insurance contract as a

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[10]Smith *v.* Baker, L. R. [1891] A. C. 325; see Osborne *v.* London etc. Ry. Co. (1888) L. R. 21. Q. B. D. 220; *contra,* Scanlon *v.* Wedger (1892) 156 Mass. 462—The dissenting opinion seems preferable.

[11]Millen *v.* Pacific Bridge Co. (1908) 51 Ore. 538; Miner *v.* Telephone Co. (1910) 83 Vt. 311. Realization of the extent or character of the injury sustainable is not, however, necessary. National Steel Co. *v.* Hore (1907) 155 Fed. 62.

[12]"Where the elements and combination out of which the danger arises, are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as a matter of law, to understand, appreciate and assume the risk of it** But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience * * * the question becomes one of law for the decision of the Court." Moody J. in Butler *v.* Frazee (1908) 211 U. S. 459, 466, 467; Hightower *v.* Gray (1904) 36 Tex. Civ. App. 674.

[13]Tex. Co. *v.* Garrett (Tex. 1911) 134 S. W. 812; Moulton *v.* Gage (1885) 138 Mass. 390. Due regard must be had for the employee's youth or inexperience. Demars *v.* Glen Mfg. Co. (1892) 67 N. H. 404.

[14]Tex. etc. Ry. *v.* Archibald (1898) 170 U. S. 665; Miner *v.* Telephone Co. *supra.*

[15]Williams *v.* Birmingham etc. Co. L. R. [1899] 2 Q. B. D. 338.

[1]As to the nature of a contract of life insurance see Grigsby *v.* Russell (1911) 222 U. S. 149.

[2]Vance, Insurance, 52.

[3]Such policies were undoubtedly allowed until the passage of 19 Geo. II c. 37 (1746) which prohibited the making of further assurances "interest or no interest." See Depaba *v.* Ludlow (1726) 1 Com. 360; Assievedo *v.* Cambridge (1711) 10 Mod. 77; 2 Park, Ins. (6th ed.) 259 *et seq.*